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No. 684

In the Supreme Court of the United States

OCTOBER TERM, 1957

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

JEROME D. FENTON,
General Counsel,
National Labor Relations Board,
Washington 25, D. C.

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Both the instant case and *National Labor Relations Board* v. *Duval Jewelry Co.*, No. 234, this Term, in which the Court granted certiorari on October 14, 1957, present the question whether the Board may by administrative regulation provide that applications to revoke subpenas which are returnable at a hearing shall be filed with and ruled on in the first instance by the officer presiding at such hearing, namely, the hearing officer in a representation case (as in *Duval*) or by a trial examiner in an unfair labor practice case (as in the instant case).[1] The instant case presents two further related questions,

[1] Here, unlike *Duval*, an independent source of authority with respect to subpenas is furnished by the Administrative Procedure Act (5 U. S. C. 1004 (c), 1006, 1010), applicable only to trial examiners.

not directly before the Court in *Duval,* but which are also of importance in the administration of the National Labor Relations Act. These concern the Board's power to delegate to subordinates the authority to issue subpenas and the standing of the Board's General Counsel to apply for subpenas as a "party" within the meaning of Section 11 (1) of the Act.

Accordingly, although the Board believes that the decision of the court below is correct on all these issues, in view of the pendency of the *Duval* case we do not oppose the granting of certiorari here and respectfully suggest that, if the writ issues, the instant case be set down for argument immediately following *Duval.*

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
National Labor Relations Board.

JANUARY 1958.

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OPINIONS BELOW

The opinion of the court below (R. 88–98) is reported at 249 F. 2d 832. The District Court issued no opinion, but its order is set forth at R. 83–84.

JURISDICTION

The judgment of the court below (R. 98–99) was entered on October 29, 1957. The petition for a writ of certiorari was filed on December 23, 1957, and

granted on January 27, 1958 (R. 99). The jurisdiction of this Court rests on 28 U. S. C. 1254.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set forth in the Board's brief in the companion case, *National Labor Relations Board* v. *Duval Jewelry Company*, No. 234, this Term, pp. 55–59. The pertinent provisions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are set forth in the Appendix, *infra*, pp. 41–44. The relevant provisions of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth at pp. 59–63 of the Board's brief in No. 234 and in the Appendix hereto, *infra*, pp. 44–47.

QUESTIONS PRESENTED

Section 11 (1) of the National Labor Relations Act, as amended (referred to herein as "the Act"), provides in relevant part that the "Board, or any member thereof, shall upon application of any party * * * forthwith issue to such party" subpenas requiring testimony or the production of evidence. The Section further provides that, within five days after service of a subpena on any such person requiring the production of evidence, "such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to * * * any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required."

Section 7 (b) of the Administrative Procedure Act provides, in relevant part, that "Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to * * * (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, * * * [and] (7) dispose of procedural requests or similar matters * * * *."

The questions presented are:

1. Whether the Board, by rule, may require that a petition to revoke a subpena returnable at a hearing in an unfair labor practice case—which is presided over by a trial examiner—shall be filed with, and ruled on in the first instance by the trial examiner, the Board reserving the right to review his ruling by "special appeal."[1]

2. Whether the Board, by rule, may authorize its Regional Directors to issue subpenas on behalf of a Board member.

3. Whether the General Counsel of the Board is, under Section 11 (1) of the Act, a "party" to an unfair labor practice case, and thus entitled to apply for issuance of subpenas.

STATEMENT

A. The unfair labor practice proceeding

On April 30, 1956, the General Counsel, acting on behalf of the Board and pursuant to his powers under the Act, issued through the Board's Regional Director

[1] The same question is presented in the *Duval* case, except that it involves a hearing officer in a representation case, who (unlike the trial examiner here) is not under the Administrative Procedure Act.

at Los Angeles a consolidated complaint against the Lewis Food Company and the Association of Independent Workers of America. The complaint alleged that the Company had engaged in unfair labor practices in violation of Section 8 (a) (1), (2) and (3), and that the Union had violated Section 8 (b) (1) (A) and (2). The consolidated complaint was issued and served upon the parties together with a notice that a hearing would be conducted, before a duly designated trial examiner of the Board, on the allegations set forth in the complaint (R. 19–25).

On June 1, 4 and 5, 1956, at the written request of the attorney assigned to try the case on behalf of the General Counsel of the Board, the Regional Director at Los Angeles issued several subpenas *ad testificandum* and *duces tecum*, under the seal of the Board and the facsimile signature of Abe Murdock, a member of the Board. The subpenas directed petitioners to appear at the hearing on June 11 and to testify and produce specified documents (R. 30–44). The subpenas *duces tecum* were addressed to petitioners Lewis and Schmidt, president of the Company and secretary-treasurer of the union, respectively, who were jointly charged with the commission of unfair labor practices, and called for the production of specified employment records of the Company and membership, organizational and dues records of the union (R. 30–32, 41–43). The subpenas *ad testificandum* were addressed to the remaining petitioners herein, who are employees of the Company (R. 32–40, 23, 28, 69).

On June 11, the day of the hearing, all petitioners filed petitions with the Board's Regional Director, but

addressed directly to the Board, requesting that the subpenas served upon them be revoked (R. 44–51). Their requests were predicated on the ground that the subpenas were invalid because (1) they had not been issued by the Board or a member thereof, as required by Section 11 (1) of the Act, and (2) the General Counsel of the Board was not entitled to obtain the subpenas in that he was not a "party" to the proceeding (*ibid.*). In addition, petitioners Lewis and Schmidt also challenged the relevancy of the documents which they were required to produce by the subpenas *duces tecum* served upon them (R. 44–45, 47–49).

The Board's Regional Director, in accordance with the Board's Rules and Regulations, referred the petitions to revoke the subpenas to the trial examiner for a ruling in the first instance (R. 51–52). On the same day, the hearing having opened, the trial examiner, following argument and over the objection of counsel for petitioners that he lacked authority to rule on the petitions to revoke, denied them (R. 56–68, 71–73). Petitioners did not appear in response to the subpenas, and their counsel stated to the trial examiner, after his ruling, that they would continue not to comply with the subpenas until ordered to do so (R. 74–75). Thereupon, counsel for the Board's General Counsel requested that the hearing be continued until the subpenas could be enforced, stating that the evidence to be adduced through the subpenaed witnesses was essential to the presentation of his case (R. 75–76). The request was granted, and the hearing was continued indefinitely (R. 80).

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B. The court proceedings for enforcement of the subpenas

On June 29, 1956, the Board, by its General Counsel, filed the present suit in the District Court for enforcement of the subpenas served upon petitioners (R. 3–9). Petitioners opposed the action on the grounds (1) that the Regional Director did not have authority to issue the subpenas, (2) the trial examiner did not have authority to rule upon the petitions to revoke the subpenas, and (3) the Board's General Counsel was not entitled to the issuance of the subpenas upon his application. Petitioners Lewis and Schmidt did not renew their objections to the relevance of the documents required to be produced by them under the subpenas *duces tecum* addressed to them (Pet. Br., p. 4).

The District Court, on July 30, 1956, issued an order denying enforcement of the subpenas on the authority of *National Labor Relations Board* v. *Pesante*, 119 F. Supp. 444 (S. D. Calif.) (R. 83–84). The *Pesante* case, so far as here relevant, held that (1) subpenas issued under the facsimile signature of a Board member are valid under the Act; (2) however, the Board must itself pass upon petitions to revoke subpenas; and (3) the General Counsel is not a "party" to a Board proceeding and hence neither he nor the attorneys under his supervision may request subpenas.

On appeal, the court below reversed the District Court's order (R. 98–99). Viewing the Board's procedure for the revocation of subpenas as a delegation by the Board of that function to the trial examiner, the court below held that the National Labor Rela-

tions Act authorized such a delegation. Following *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, which dealt with the Emergency Price Control Act, the court found sufficient authority for delegation of the revocation function in the Board's rule-making power under Section 6 of the Labor Act. The court noted that the latter Act "does not expressly forbid the Board to delegate this function," and that Congress manifested no "restrictive intention" respecting such delegation. In these circumstances, the court concluded, the Board's rule-making power could properly be used to authorize trial examiners to rule on the validity of subpenas and thereby avoid "The practical difficulties in administration which would [otherwise] arise, * * * [and] would substantially impede the effectuation of the Board's primary function" (R. 94–96).[2]

The court below also rejected petitioners' contentions that the subpenas were invalidly issued, and that the attorney assigned to try an unfair labor practice case on behalf of the General Counsel of the Board was not a "party" entitled to apply for subpenas (R. 91–92, 96–98).

SUMMARY OF ARGUMENT

I

The Board's procedure pursuant to which trial examiners in unfair labor practice cases rule in the first instance on petitions to revoke subpenas is valid.

[2] Although fully presented in the Board's brief, the court below did not pass on the additional contention that Section 7 (b) of the Administrative Procedure Act independently authorized the trial examiner to rule on the petitions to revoke the subpenas in this case.

The considerations advanced in the Board's brief in *National Labor Relations Board* v. *Duval Jewelry Company*, No. 234, this Term, a companion case, which show that the National Labor Relations Act authorizes such rulings by hearing officers in representation cases, apply with equal cogency to trial examiners in unfair labor practice cases.

Independently of the Labor Act, Section 7 (b) of the Administrative Procedure Act provides an alternative source of authority for trial examiner determinations as to the validity of subpenas. Such examiners, unlike hearing officers in representation cases, are vested by Section 7 (b) of the Administrative Procedure Act with authority to "issue subpenas authorized by law * * * rule upon offers of proof and receive relevant evidence * * * regulate the course of the hearing * * * dispose of procedural requests or similar matters * * *, [and] take any other action authorized by agency rule consistent with this Act." Each of these general powers may reasonably be deemed to encompass rulings upon a challenge to a subpena. In particular, the power to "issue subpenas" was intended by Congress to comprehend the full subpena power of the agency involved, including the decisional power respecting the propriety of subpenas. This intent is evidenced by the use of the qualifying phrase "authorized by law" following the grant of the power to "issue subpenas". This qualification indicates that the examiner is not merely to "issue" but also to rule on the legal sufficiency of the subpenas. This conclusion is also supported by the express association of the same phrase "issue sub-

penas" with a ruling as to sufficiency in Section 6 (c) of the Administrative Procedure Act. Usage by Congress of the term "issue" to include a determination of the validity of subpenas is readily understandable, for the ordinary practice of agencies, including that of the National Labor Relations Board prior to the 1947 amendments, has been to make the determination of validity upon the application for a subpena. Reading the authority to "issue subpenas" as encompassing authority to rule on a petition to revoke, moreover, comports with Congress' intent, strongly evidenced in the legislative history of the Administrative Procedure Act, to increase the stature and responsibility of hearing examiners. The purpose of vesting such examiners with the subpena power plainly was not merely to commit to them the clerical operation of furnishing subpenas on demand, but to make a grant of substantive power with respect to subpenas.

The subpena authority of trial examiners derived from Section 7 (b) of the Administrative Procedure Act is in no way contingent upon the delegability of that authority under the National Labor Relations Act. The grant of the authorities enumerated in Section 7 (b) is made independently of any agency statute, and, indeed, because of that Section, "an agency is without power to withhold such powers from its hearing officers." Attorney General's Manual on the Administrative Procedure Act (1947), p. 74. This factor distinguishes from the present case *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, which arose prior to the enactment

of the Administrative Procedure Act and dealt with the delegability of administrative subpena power under the particular statutes there involved.

II

In implementation of the statutory directive that the "Board or any member thereof, shall upon application of any party * * * forthwith issue to such party subpenas * * *," the Board furnishes to its regional offices and trial examiners blank subpenas bearing its seal and the facsimile signature of one of its members for their delivery to applying parties. This procedure is entirely valid. Petitioners' contentions that the procedure is an improper delegation of power is untenable for two reasons. First, viewed as a delegation of power, it involves no more than the ministerial task of automatically supplying subpenas and therefore is necessarily delegable, if, as we have shown in our brief in *Duval*, No. 234 (pp. 25-50), the substantive authority to rule on the validity of subpenas may be delegated. Second, inasmuch as the furnishing of subpenas under the Act is a ministerial act, no question of delegation is properly presented; delegation problems arise only with respect to discretionary acts. The propriety of the performance of routine ministerial acts by government agencies through subordinate officials has been long recognized. *Hitchcock* v. *Galveston*, 96 U. S. 341, 348. No reason appears for not applying the same principle here. To require the Board members personally to furnish subpenas would raise

needless impediments to the efficient administration of the Act without any compensating benefits.

III

There is no merit to petitioners' contention that the General Counsel of the Board was not a party to the unfair labor practice proceeding and therefore that Section 11 (1) of the Act, which provides for the issuance of subpenas "upon application of any party," precludes his access to compulsory process. The consequence of petitioners' argument is that one side, but not the other, is disallowed use of subpenas in unfair labor practice cases, for the Act expressly vests the General Counsel with the power of prosecution in all such cases.

The Act itself is wholly devoid of any support for this conclusion—a conclusion that negates the overriding purpose of the subpena power, *i. e.*, to permit decision to be based on all relevant facts that may properly be considered. On the contrary, in giving the General Counsel the power of investigation, of framing the issues in the complaint, and of handling all other aspects of the prosecution of unfair labor practice cases—all of which powers are to be exercised in the public interest rather than that of "any private person or group" (*Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265)—the Act plainly makes him an essential party.

The Administrative Procedure Act confirms this conclusion. That statute utilizes the term "party" to include agency prosecutors, and its legislative history shows that Congress intended that the subpena power

should be available to prosecutors and respondents alike in administrative adjudication.

ARGUMENT

The principal question in this case is the validity of the Board's procedures governing the revocation of subpenas in unfair labor practice cases. This question is similar to that presented in *National Labor Relations Board* v. *Duval Jewelry Company*, No. 234, this Term, which involves the validity of the Board's rules governing the revocation of subpenas in representation cases. Insofar as the National Labor Relations Act, as amended, serves as authority for these rules, the fact that No. 234 involves a representation proceeding and this case an unfair labor practice proceeding is irrelevant. The provision in Section 11 (1) relating to the revocation of subpenas applies to "all hearings and investigations * * * [under] section 9 [which deals with representation cases] and section 10 [which deals with unfair labor practice cases]." And the Board's Rules and Regulations vest identical authority in both hearing officers in representation cases and trial examiners in unfair labor practice cases to make initial rulings upon petitions to revoke subpenas, subject to the same appeal and review procedures before the Board. See the Board's brief in No. 234, pp. 17–20. Accordingly, the same considerations advanced in the Board's brief in No. 234, in support of our position that the Labor Act itself authorizes the Board to empower a hearing officer to rule initially on petitions to revoke subpenas, apply with equal force to a trial examiner in an unfair labor

practice case. We therefore respectfully refer the Court to the Board's brief in No. 234 (pp. 21–50) for our answer to petitioners' contention that the trial examiner in this case lacked power under the Act to rule on their petitions to revoke the subpenas.

Quite apart from the provisions of the Labor Act, however, we submit that Section 7 (b) of the Administrative Procedure Act independently authorizes trial examiners in unfair labor practice cases to determine the validity of subpenas. We thus show in Point I, below, that the Administrative Procedure Act provides alternative and equally cogent grounds for upholding the authority of the trial examiner to make the ruling in this case on petitioners' petitions to revoke the subpenas.

We shall then treat petitioners' remaining contentions. In Point II we show that the Board's procedures for the issuance of subpenas are valid, and in Point III we show that the Act makes subpenas available to the General Counsel of the Board, as the party responsible for the prosecution of an unfair labor practice case.

I. Section 7 (b) of the Administrative Procedure Act independently authorizes trial examiners in unfair labor practice cases to rule upon the validity of Board subpenas

The unfair labor practice proceeding in which petitioners were served with subpenas constituted a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," within the meaning of Section 5 of the Administrative Procedure Act, and therefore,

as required both by that Section and Section 7 (a), was heard by a trial examiner appointed pursuant to Section 11 of that statute.[3] Such trial examiners are vested with specific powers by the Administrative Procedure Act with respect to the hearings they conduct, including, in our view, the power to rule upon the validity of subpenas issued in an unfair labor practice proceeding.

Section 7 (b) of the Administrative Procedure Act provides:

> Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

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[3] On the other hand, representation proceedings under the National Labor Relations Act, like those involved in No. 234, are expressly excepted in Section 5 of the Administrative Procedure Act from the formal hearing requirements of that statute, including the requirement that hearing officers be appointed in accordance with the provisions of Section 11. Accordingly, a regional office attorney or field examiner usually serves as the hearing officer in a representation case.

The two general qualifications on this broad grant of authority—that the authority exercised by the presiding officer be "subject to the published rules of the agency and within its powers"—are plainly satisfied in this case. The Board's Rules and Regulations explicitly authorize the trial examiner to rule on the validity of subpenas, and, since Section 11 (1) of the Act expressly grants the Board power to issue and revoke subpenas, the exercise of such function by the trial examiner is "within [the agency's] powers."[4] See Board's brief in No. 234, pp. 15–20, esp. n. 6; *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895, 898 (S. D. N. Y.). And, as we now show, the power to "issue subpenas authorized by law," as well as the other powers enumerated in Section 7 (b), comprehends ruling upon petitions to revoke subpenas. See *National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895 (S. D. N. Y.); *National Labor Labor Relations Board* v. *Gunaca*, 230 F. 2d 542 (C. A. 7), affirming 135 F. Supp. 790 (E. D. Wis.).[5]

[4] With reference to the phrase "within [the agency's] powers," the Attorney General's Manual on the Administrative Procedure Act (1947) points out (pp. 74–75): "* * * the subsection vests in hearing officer only such of the enumerated powers as the agency itself possesses. If an agency lacks the authority to issue subpenas, subsection 7 (b) does not grant the subpena power to that agency's hearing officers."

[5] As indicated *supra*, n. 2, the court below did not refer to the Administrative Procedure Act, finding that the National Labor Relations Act itself authorized delegation of the subpena power to trial examiners. The *Pesante* case, *supra*, relied on by the District Court in this case, involved revocation of a subpena by a hearing officer in a representation case, the

1. The authority to "issue subpenas" conferred by Section 7 (b) does not merely relate to the mechanical function of furnishing subpenas upon request. Congress meant thereby to vest hearing examiners with the full subpena power possessed by the agency involved, including the decisional power respecting the validity of subpenas—irrespective of whether the decisional power was exercised at the issuance stage or, as here, at a subsequent petition to revoke stage (see Board's brief in No. 234, pp. 26, n. 15, 28, n. 16). Thus, the qualifying phrase "authorized by law" immediately follows the grant of authority to "issue subpenas," indicating that a hearing examiner, in determining whether to issue subpenas, is to make a decision as to their legal sufficiency. This interpretation of the term "issue" is confirmed by Section 6 (c) of the Administrative Procedure Act which describes the subpena authority of agencies. It is there provided that subpenas "shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." Here, the act of issuance of the subpena is expressly conditioned on a determination of its propriety. And, if the term "issue" expressly involves the exercise of decisional judgment under Section 6 (c), the identical term can

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situation in No. 234, and therefore the application of Section 7 (b) of the Administrative Procedure Act was not involved. The District Court in this case is, therefore, the only court, of those which have considered the application of Section 7 (b) to this problem, that has reached a conclusion adverse to the Board's position.

reasonably be said to carry the same meaning in Section 7 (b). Cf. *National Labor Relations Board* v. *Lion Oil Co.*, 352 U. S. 282, 290.

Nor is it significant that Congress mentioned only the issuance of subpenas and did not specifically refer to petitions to revoke them. The description by Congress of the general subpena power of administrative agencies in terms of issuance is readily understandable in view of the ordinary practice of agencies to make a determination of the propriety of a subpena upon application of a party therefor. Indeed, this was the situation under the National Labor Relations Act prior to the 1947 amendments. See Board's brief in No. 234, pp. 41–43. And, with reference to the Wage and Hour Act and the Emergency Price Control Act, respectively, see *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, discussed in the Board's brief in No. 234, pp. 26–27, n. 15.[6] The procedure under the Labor Act, as amended, achieves the same result in two steps instead of one—*i. e.*, the decision as to validity of the

[6] The usual rule is well illustrated by the remarks of the Court of Appeals for the Second Circuit with respect to the Federal Trade Commission Act: "[The] Commission is not bound to issue subpoenas *duces tecum* upon request as a ministerial act and then to entertain a motion to quash or to modify. It has a quasi-judicial discretion to deny the application." *Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468, 471. As to other agencies, see Note, *Subpoenas and Due Process in Administrative Hearings*, 53 Harv. L. Rev. 842, 847; Davis, *Administrative Law* (1951), p. 303. Compare *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 306.

subpena is merely transferred from the issuance stage to the petition to revoke stage. In these circumstances, it would exalt form over substance to conclude that Congress did not intend to encompass this procedure as well as the more conventional procedure where discretion was exercised at the issuance stage. Clearly, Congress could not have been expected in Section 7 (b) to spell out explicitly every conceivable subpena procedure which it intended to cover.

Viewing the grant of power to hearing examiners to issue subpenas, contained in Section 7 (b) of the Administrative Procedure Act, as encompassing power to rule on the subpoenas' validity, is consistent, moreover, with Congress' underlying purpose in giving hearing examiners the various functions enumerated in that Section. The powers enumerated in Section 7 (b), including the subpena power, reflect a Congressional "purpose to increase the importance of the role of examiners in the administrative process." *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U. S. 474, 495. The Attorney General's Committee on Administrative Procedure, whose report was heavily relied on by the draftsmen of the Administrative Procedure Act, strongly urged that more responsibility be given to hearing officers; that they "be fully empowered by statute to preside at hearings, issue subpoenas, administer oaths, rule upon motions, carry out other duties incident to the proper conduct of hearings, and make findings of fact, conclusions of law and orders for the disposition of matters coming before them." Final Report (Gov't

Print. Off., 1941), p. 50; see also pp. 45–46, 51. Section 7 (b) was drafted in direct response to these recommendations. As explained by the Senate Committee which reported out the bill which was subsequently enacted, "The statement of the powers of administrative hearing officers [contained in Section 7 (b)] is designed to secure that responsibility and status which the Attorney General's Committee stressed as essential." Sen Comm. Print S–7 (Revised), 79th Cong., 1st Sess., p. 14, Leg. Hist. of the Administrative Procedure Act, p. 29.[7] And, as further stated in the Senate Report, Section 7 (b) "is designed to assure that the presiding officer will perform a real function rather than serve merely as a notary or policeman." Sen. Rep. 752, 79th Cong., 1st Sess., p. 21, Leg. Hist., p. 207. See, also, Davis, *Administrative Law* (1951), pp. 309, 312. Indeed, to insure the desired result that "formal administrative adjudication" at the hearing stage be handled by "competent and well-paid men exercising functions of responsibility and interest" (Final Report, *supra*, at p. 46), Congress took steps "to make hearing examiners 'a special class of semi-independent subordinate hearing officers' * * * " (*Ramspeck* v. *Trial Examiners Conference*, 345 U. S. 128, 132, quoting from Sen. Rep. 752, 79th Cong., 1st Sess., Leg. Hist., p. 192). See Section 11 of the Administrative Procedure Act.

[7] The materials constituting the legislative history of the Administrative Procedure Act are published in a single volume, issued as Sen. Doc. 248, 79th Cong., 2d Sess., hereafter referred to as "Leg. Hist."

There can be little doubt that a reading of Section 7 (b) so as to vest only the mere clerical function of furnishing subpenas in hearing examiners deemphasizes rather than enhances the stature and responsibility of trial examiners. On the other hand, the reading which we have suggested—which empowers hearing examiners to exercise their judgment as to the propriety of subpenas in the hearings before them—is consistent with and implements the Congressional intent to increase the substantive powers and stature of trial examiners in administrative hearings. For the essence of subpena power is not the ministerial act of supplying a subpena on demand, but the substantive act of ruling on its validity. See Davis, *Administrative Law* (1951), pp. 81, 312.

Finally, it should be noted that Section 7 (b) of the Administrative Procedure Act, in addition to empowering a hearing examiner to issue subpenas, authorizes them to "rule upon offers of proof and receive relevant evidence * * * regulate the course of the hearing * * * dispose of procedural requests or similar matters, * * * and * * * take any other action authorized by agency rule consistent with this Act." The authority of the hearing examiner to rule on the validity of a subpoena may quite properly rest on these powers independently of the issuance power. Authority to "receive relevant evidence," to "regulate the course of the hearing," and to "dispose of procedural requests or similar matters" are stated in general terms, and may reasonably be deemed to encompass rulings upon a challenge to the validity of a subpoena. Moreover, the Board Rule providing that the initial

decision upon a petition to revoke a subpena shall be made by the trial examiner gives due recognition to the role which Congress intended him to play in administrative hearings. This is certainly "consistent with [the Administrative Procedure] Act" and therefore permitted by the final clause of Section 7 (b).

In sum, both the power to issue subpenas and the various powers relating to the conduct of hearings by trial examiners, enumerated in Section 7 (b) of the Administrative Procedure Act, whether considered separately or together, authorize such examiners to rule on challenges to the propriety of subpenas. Hence, that Act furnished an independent source of authority for the trial examiner in this case to rule on the petitions to revoke the subpenas served on petitioners.[8] Indeed, as Judge Medina added, in arriving at the same conclusion (*National Labor Relations Board* v. *International Typographical Union*, 76 F. Supp. 895, 896–897 (S. D. N. Y.)):

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[8] In this case, petitions to revoke were filed, and denied by the trial examiner, with respect to both subpenas *duces tecum* and subpenas *ad testificandum* (*supra*, pp. 4–5). It is the Board's position that the National Labor Relations Act and the Administrative Procedure Act authorize its trial examiners to revoke both types of subpenas. It has been suggested, however, that Section 11 (1) of the National Labor Relations Act provides only for the revocation of subpenas *duces tecum*, and that no authority is given even to the Board itself to revoke subpenas *ad testificandum*. Thus, the statutory language dealing with revocation refers only to "a subpena * * * requiring the production of any evidence in his possession or under his control," and permits revocation if "the evidence whose production is required does not relate to any matter under investigation * * * or if * * * such subpena does not describe with sufficient particularity the evidence whose production is required." This was

> Great care was taken by the Congress so to frame the text of the Labor Management Relations Act of 1947 that it would function pari passu with the Administrative Procedure Act * * *. This co-relation was particularly important in the case of the powers of trial examiners because of the separation in the Labor Management Relations Act of 1947 of the prosecutory functions on the one hand and the judicial and quasi-judicial functions on the other. * * *.
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> Thus, as the two statutes are to be read together, it seems reasonably clear that the National Labor Relations Board was authorized

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the view of the Court of Appeals in No. 234 (see R. in No. 234, p. 162).

If this reading of Section 11 be valid, the petitions to revoke the subpenas *ad testificandum* were superfluous, and petitioners could not defend against enforcement of those subpenas on the ground that there had been no ruling on the petitions by the Board.

In the Board's view, however, Section 11 of the National Labor Relations Act should not be construed to limit the application of the revocation procedure to subpenas *duces tecum*. Inasmuch as testimonial subpenas, like subpenas calling for documents, must be issued forthwith on application, there are occasions when a petition to revoke or a motion to quash would be the only reasonable procedure for challenging and obtaining a ruling from the Board on their validity, *e. g.*, where the person served with the subpena is confined in an institution. Cf. *New Britain Machine Co.*, 105 N. L. R. B. 646. A revocation procedure for testimonial subpenas is not expressly forbidden and would appear to be within the Board's power, as stated in Section 6 of the National Labor Relations Act, "to make * * * such rules and regulations as may be necessary to carry out the provisions of this Act." Accordingly, the Board believes that the same revocation question presented with respect to subpenas *duces tecum* exists with respect to subpenas *ad testificandum*, and the court below so assumed (R. 93, n. 2).

> to formulate rules pursuant to the terms of which trial examiners might issue subpenas and "dispose of procedural requests or similar matters," such as the determination of whether or not, to use the traditional term, subpenas should be quashed. * * *

2. As we have shown in our brief in No. 234 (pp. 15–24), the Board, although requiring that petitions to revoke subpenas be ruled on in the first instance by the trial examiner or the hearing officer, as the case may be, retains, through its "special appeal" procedure, an overriding decisional authority; therefore, there has been no true delegation of the Board's subpena power. However, should the Board's subpena procedure nevertheless be regarded as entailing a delegation of Board power, Section 7 (b) of the Administrative Procedure Act has the additional effect of removing any question of delegation insofar as trial examiners in unfair labor practice cases are concerned. That is, where, as here, the agency involved possesses the subpena power, Section 7 (b) directly vests that power in the hearing examiner as well. The net result is as if Section 11 (1) of the Labor Act itself specifically provided that the subpena power shall be exercised by the Board or its trial examiners. As stated in the Attorney General's Manual on the Administrative Procedure Act (p. 74):

> In other words, not only are the enumerated powers thus given to hearing officers by section 7 (b) without the necessity of express agency delegation, but an agency is without power to withhold such powers from its hearing officers. This follows not only from the

statutory language, "shall have authority," but from the general statutory purpose of enhancing the status and role of hearing officers.[9]

For this additional reason, neither *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, nor *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, has any relevance to the instant case. These cases (discussed more fully in our brief in No. 234, pp. 25–30), which arose prior to the effective date of the Administrative Procedure Act, dealt with the question of whether the statutes there involved warranted the inference that Congress had intended to permit delegation of subpena powers. The Administrative Procedure Act removes any need for implication in the situations it governs, by directly vesting subpena power in hearing examiners.[10]

II. The Board may properly authorize its regional director to issue subpenas on behalf of a Board member

Section 11 (1) of the National Labor Relations Act provides that the "Board or any member thereof, shall upon application of any party" to a proceeding, "forthwith issue to such party subpenas." As stated by the Court of Appeals for the Seventh Cir-

[9] See, also, Nathanson, *Some Comments on the Administrative Procedure Act*, 41 Ill. L. Rev. 368, 391–392.

[10] See the statement in the Attorney General's Manual on the Administrative Procedure Act, p. 74, n. 2: "Since section 7 (b) itself vests these powers (including the subpena power) in hearing officers, *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357 (1942), and *Fleming* v. *Mohawk Co.*, 331 U. S. 111 (1947), dealing with the authority of agencies to delegate such powers, have no application here."

cuit. (*National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160):

> This [provision] made the issuance of subpoenas mandatory. All discretion as to their issuance was removed. The only function in connection with subpoenas which is not now a ministerial act under this section is the determination to either grant or refuse the petition to revoke.

The Board has implemented this provision in this way: blank subpenas bearing the Board's seal and the facsimile signature of a Board member are supplied its regional offices and trial examiners; upon the application of a proper party, the Regional Director (if, as here, the request occurs prior to the hearing), or the hearing official (if the request occurs at the hearing), automatically issues the subpena to the applicant. This procedure was followed in this case when the trial attorney representing the Board's General Counsel requested the subpenas here involved from the Regional Director, who in turn issued them to the attorney, under the facsimile signature of a Board member. As noted by the court below (R. 91–92), the validity of this procedure has been upheld by every court which has had occasion to pass on it. See *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156 (C. A. 7); *Edwards* v. *National Labor Relations Board*, 189 F. 2d 970 (C. A. 5), certiorari denied, 342 U. S. 870; *Jackson Packing Co.* v. *National Labor Relations Board*, 204 F. 2d 842 (C. A. 5); *National Labor Relations Board* v. *Gu-*

naca, 135 F. Supp. 790, 793–795 (E. D. Wis.), affirmed, 230 F. 2d 542 (C. A. 7), vacated and dismissed as moot, 353 U. S. 902; *National Labor Relations Board* v. *Pesante*, 119 F. Supp. 444, 455–456 (S. D. Calif.). Petitioners nonetheless assert that Section 11 (1) of the Act requires that the Board or one of its members personally perform the mechanical operation of furnishing subpenas when requested.

Petitioners' position rests on the assumption that the procedure thus described entails a delegation of Board power to subordinates, contrary to the terms of the statute. This view is erroneous for two reasons. First, even if there be a delegation of the power to issue, such delegation would not be barred by the Act. If, as our alternative argument in *Duval* establishes (Board's brief, pp. 25–50), the Act does not bar the Board from delegating to subordinates the power to rule on petitions to revoke subpenas, it follows, *a fortiori*, that the Act permits a delegation of the lesser, ministerial task of furnishing subpenas "forthwith" upon request.

Second, properly speaking, the Board's issuance procedure presents no delegation question at all. A problem of delegation exists only where the subordinate official is authorized to perform a discretionary act entailing the exercise of judgment, which is not subject to any direct control or supervision by the agency head. In this sense, not even the Board's revocation procedure involves a true delegation, for, although discretion is involved, the hearing officer's decision is subject to direct control by the Board

(Board's brief in No. 234, pp. 21–24). Since no act of discretion is involved in the grant of a Board subpena, it is even clearer that the issuance procedure likewise involves no delegation in any legal sense. In instructing its Regional Directors to grant the subpenas forthwith upon request, the Board does no more than utilize such officials as its mechanical arms in the performance of a ministerial act. See Davis, *Administrative Law* (1951), p. 81.

The propriety of an agency's carrying on its routine, nondiscretionary business through its subordinate officials cannot seriously be questioned. This method of conducting government affairs has long been acknowledged as permissible and necessary under the common sense principle that a public body, "like every other corporation, * * * could do its ministerial work by agents." *Hitchcock* v. *Galveston*, 96 U. S. 341, 348. As stated by this Court, in rejecting a claim that a statute placing specified notice requirements on the Secretary of War was not complied with when the notice in fact was given by an official under the Secretary (*Miller* v. *Mayor of New York*, 109 U. S. 385, 394):

> When a secretary of the government is required to give information on any subject, he may act, and generally does act, through officers under him. He is not expected to make over his own signature all the communications required from the department of which he is the head. It would be impracticable for him to do so. The official communication is deemed

made by him when it is made under his sanction and direction."

No reason appears for not applying this principle to the Board's procedures for the granting of subpenas. To say that only a Board member may fill out and deliver the subpena is in effect to require the members of the Board to act as messenger boys. It might as well be said that the clerk of a federal district court is without power to authorize his deputy to deliver the signed and sealed subpenas that must be granted forthwith under Rule 45 (a) of the Federal Rules of Civil Procedure. Plainly no such stultifying impediment to the exercise of the subpena power was contemplated. Moreover, to require Board members personally to furnish subpenas would raise needless obstacles to an efficient handling of representation and unfair labor practice cases. As emphasized by the Court of Appeals for the Seventh Circuit (*National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, 160):

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[11] Compare the statement in *United States* v. *Bareno*, 50 F. Supp. 520, 527–528 (D. Md.):

"Heads of Government departments and boards must act, and presumably have been acting time out of mind, vicariously in the performance of their routine business. It is impossible for them to do otherwise and dispose of the large volume of work. But they still remain * * * responsible for the acts of their subordinates."

See, also, *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194, 206; *Tung Tui* v. *Edsell*, 223 U. S. 673, 682; *United States* v. *Chemical Foundation*, 272 U. S. 1, 13, *Shreveport Engraving Co., Inc.* v. *United States*, 143 F. 2d 222, 227 (C. A. 5); *In re Triangle S. S. Co.*, 3 F. 2d 894, 896 (C. A. 2), certiorari denied, 267 U. S. 597.

> If * * *, it is necessary for the Board, or a member thereof, to not only sign his name and affix the seal of the Board to each subpoena, but also to fill in all of the blanks and then to issue it to the party or cause it to be served, it would first be necessary to send to the Board a copy of the application for the subpoena, the information required for filling in all the blanks, and a showing that the applicant for the subpoena was a party to the particular proceedings. If the proceedings were being held on the West coast or at any other far distant point, the expression "forthwith" would lose all significance.

Petitioners assert, however, that the furnishing of subpenas "is not ministerial" because the task presupposes a determination by the issuing officer as to "(a) whether there is a proceeding pending such as described in Section 11 (1) and (b) whether the applicant is a bona fide party to the proceeding" (Br. p. 27). These prerequisites to the furnishing of subpenas scarcely make less mandatory the requirement that subpenas be issued "forthwith." As explained by this Court in rejecting a similar contention (*Roberts* v. *United States*, 176 U. S. 221, 231):

> Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial

> one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. * * *[12]

Moreover, rulings upon questions that may arise as to the propriety of issuing a subpena under the Act have been expressly provided for under the procedure for revocation. Indeed, it was by the filing of petitions to revoke that petitioners raised the question of whether the General Counsel of the Board was a party entitled to apply for subpenas in this case. This further demonstrates that, at the very most, all that is required for the granting of a subpena under Section 11 (1) of the Act is a colorable claim that the applicant is a party to a Board proceeding, and its evaluation calls for no greater degree of judgment on the part of the issuing authority than that involved in many ministerial acts.

Inasmuch as the Board has no discretion to withhold a subpena requested by any party, this Court's decisions in *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, and *Fleming* v. *Mohawk Wrecking & Lumber Co.*, 331 U. S. 111, relied on by petitioners, have no application to the present question. The delegated subpena powers in those cases included the discretionary determination of whether a subpena was valid, a determination made under the National Labor Relations Act only upon the filing of a petition to revoke.

[12] See, also, *Work* v. *McAlester-Edwards Co.*, 262 U. S. 200, 208; *Miguel* v. *McCarl*, 291 U. S. 442.

See Board's brief in No. 234, pp. 26–27, n. 15. There is nothing in the *Cudahy* decision to suggest that where the furnishing of a subpena is ministerial, as here, the act may not be performed through a subordinate official.

In sum, the Board's rule respecting the furnishing of subpenas by Regional Directors is within established principles authorizing the use of assistants to perform ministerial acts, and is otherwise consistent with, and effectuates the administration of, the Act.[13]

III. The Act makes subpenas available to the General Counsel of the Board in the prosecution of an unfair labor practice case

Asserting that the General Counsel of the Board was not a party to the unfair labor practice proceed-

[13] It may be noted that, as a matter of sound administrative practice, trial attorneys and others on the staff of the Board's General Counsel who have occasion to request subpenas, are required to consider carefully the propriety of applying for subpenas in the light of specified criteria. Thus, the Board's Field Manual provides in part:

"Section 11770 * * * investigative subpenas are not to be used unless and until all reasonable means of obtaining the same information by other means have been exhausted.

"Section 11772 * * * in addition to the necessity for the subpena, however, [the regional office employee handling the case] must take into consideration the potential enforcement of the subpena. The subpena should not be requested if it appears that it cannot be enforced in the event of noncompliance.

"Section 11776 * * * A subpena duces tecum should be drafted as narrowly and specifically as is consistent with the ends sought * * *. In all but the exceptional case, it is advisable to provide, *in the body of the subpena*, for alternatives in lieu of physical production—e. g., that the party against whom the subpena runs may furnish a signed statement setting forth the desired information, provided that pertinent records are made available to Board agents for the purpose of checking the accuracy of the statement."

ing, petitioners contend that the subpenas requested by him and served on them were not issued "upon application of any party," as Section 11 (1) of the Act provides, and therefore are invalid (Br., pp. 31–33). It is apparently petitioners' position that the General Counsel, who is made responsible under the Act for the prosecution of all unfair labor practice cases (*infra*, pp. 33–35), has been deprived by Section 11 (1) of the authority, usually critical to a prosecution, to subpena witnesses and documentary evidence in his presentation of such cases. Petitioners suggest that the person filing an unfair labor practice charge may be entitled to apply for subpenas in order to prove the allegations of the complaint (Br., p. 32), but are silent as to how the subpena power may be utilized by the prosecution where, as is frequently the situation, the charging party does not appear or participate in the hearing.[14] The contention was found "unten-

[14] The only person in unfair labor practice proceedings expressly given a right under the Act "to appear * * * and give testimony at the place and time fixed in the complaint" is the respondent. Section 10 (b) of the Act. Cf. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362–363; *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 393 (C. A. 8), certiorari denied, 332 U. S. 758; *Oughton* v. *National Labor Relations Board*, 118 F. 2d 486, 495–496 (C. A. 3), certiorari denied, 315 U. S. 797. Section 10 (b) of the Act also provides that "any other person may be allowed to intervene," but the authority to grant intervention is reposed "In the discretion of the member, agent, or agency conducting the hearing." In its Rules and Regulations (Section 102.8, *infra*, p. 44) the Board has provided that charging parties may participate as parties in unfair labor practice proceedings, but advantage is not always taken of this privilege.

able" by the court below (R. 97).[15] To sustain it would require the most cogent showing of a deliberate Congressional intent, for the consequence would be to emasculate the function of the General Counsel as prosecutor and to negate the underlying purpose of the subpena power, *i. e.*, to permit decision to be based on all of the relevant facts which may properly be considered in the determination of a case. Cf. *Wilson* v. *Rousseau*, 4 How. 646, 678. No such showing, however, can be made. On the contrary, as we now point out, the entire scheme of the Act, the nature of the rights it creates, and its legislative history, as well as applicable provisions of the Administrative Procedure Act, manifest an unambiguous intent to make subpenas available to the General Counsel of the Board in unfair labor practice cases, just as they are to other parties.

As stated above, Section 11 (1) of the Act requires the issuance of subpenas "upon application of any party," but the Act does not contain an express definition of the term "party." The Act does make clear, however, that the General Counsel of the Board is

[15] *National Labor Relations Board* v. *Pesante*, 119 F. Supp. 444 (S. D. Cal.), relied on by the District Court in this case, involved the issuance of subpenas upon the application of a regional director of the Board in a representation case, and to that extent presented a different question than that now before the Court. Many of the same considerations hereafter discussed in the text, however, serve to demonstrate that regional directors in representation cases, no less than the General Counsel in unfair labor practice cases, are intended by the Act to make full use of subpenas in the performance of their duties, and the Court of Appeals in No. 234 has so concluded (R. in No. 234, pp. 164–166).

the prosecuting party in all unfair labor practice cases. Thus, Section 3 (d) of the Act provides:

> [the General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board * * *.

Pursuant to this authority, the General Counsel conducts the investigation of all unfair labor practice charges, frames the issues in the case by his complaints, adduces evidence and cross-examines witnesses, and handles all other aspects of the prosecution of the case.[16] Moreover, he is even entitled to enter into binding stipulations with a respondent in the course of a hearing without the concurrence of the charging party. *International Union, Automobile Workers* v. *National Labor Relations Board*, 231 F. 2d 237, 242 (C. A. 7), certiorari denied, 352 U. S. 908. In short, the General Counsel is a principal party to the proceeding and indispensable to the prosecution of the case. As summarized by the court below (R. 97):

> Here then is an official who has life-or-death authority over the initiation of an unfair labor practice proceeding and who, if he determines that such proceedings should be commenced, is entrusted with the task of prosecution. Yet appellees urge that this official lacks authority to

[16] See, *e. g.*, *Bonwit Teller Co.* v. *National Labor Relations Board*, 197 F. 2d 640, 644 (C. A. 2), certiorari denied, 345 U. S. 905; *American Newspaper Publishers Association* v. *National Labor Relations Board*, 193 F. 2d 782, 798 (C. A. 7); *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (C. A. 9), certiorari denied, 342 U. S. 815; *Lincourt* v. *National Labor Relations Board*, 170 F. 2d 306, 307 (C. A. 1).

apply for the issuance of a subpoena. The argument is untenable.

The reasons for the critical role thus given to the General Counsel in unfair labor practice proceedings further demonstrate that the Act contemplates the availability to him of compulsory process. Control of unfair labor practice proceedings is denied private parties because Congress intended the substantive rights guaranteed in the Act to be vindicated in the public interest, and not for the benefit of "any private person or group." *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265. As this Court stated with reference to the Wagner Act, under which the Board possessed the prosecutory responsibilities now vested in the General Counsel (*National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362):

> The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. * * * It has few of the indicia of a private litigation and makes no requirement for the presence in it of any private party other than the employer charged with an unfair labor practice. The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining * * *.

By amending the Act in 1947 and establishing the independent office of General Counsel to handle the initiation and prosecution of unfair labor practice cases, Congress in no wise altered the public char-

acter of the rights involved in such cases or lessened the public nature of the prosecuting authority's function. *Garner* v. *Teamsters Union*, 346 U. S. 485, 492–494; *Haleston Drug Stores, Inc.* v. *National Labor Relations Board*, 187 F. 2d 418, 420–421 (C. A. 9), certiorari denied, 342 U. S. 815.

From the foregoing it is plain that the General Counsel's function with respect to unfair labor practice proceedings is to exercise his extensive control over presentation of cases in conformity with the dictates "of the recognized public interest." *Amalgamated Utility Workers* case, *supra*, at p. 266. Manifestly, the ability to use subpenas to reach witnesses and documentary evidence otherwise unavailable is essential to the performance of this role. And the role itself, by its very nature, is that of a "party" to an unfair labor practice proceeding. Nothing in the Act points to a contrary conclusion.[17]

[17] Petitioners assert that the General Counsel is not a party within the meaning given to that term in Section 102.8 of the Board's Rules and Regulations (Br., pp. 31–32). In the first place, that Section does not purport to define "party" as used in the Act, but rather only "as used in this part" (the Rules and Regulations). Secondly, the Section in no way purports to deny the General Counsel the status of a "party," and indeed may properly be construed to cover him within the general phrase "any person * * * entitled as of right to be admitted as a party * * *." Finally, the many provisions of the Rules and Regulations describing the procedures which "parties" are required to follow in unfair labor practice cases—respecting such matters as motions, depositions, examination of witnesses, filing of briefs and the like—make it apparent that the General Counsel is within the term "party" as used in the Board's Rules. See *e. g.*, Rules and Regulations, Sections 102.16, 102.30 (f), 102.38, 102.42, 102.46, 102.47, *infra*, pp. 45–47.

Moreover, the legislative history of the 1947 amendments to the Act contains no suggestion that Congress intended to make the drastic statutory change which petitioners urge. Clearly, the Wagner Act did not deprive the prosecuting authority in an unfair labor practice case of the right to compulsory process. Section 11 (1) of the original Act read simply that "Any member of the Board shall have power to issue subpenas * * *." The phrase "upon application of any party" was added in 1947 in connection with the new requirement that subpenas be issued "forthwith." There is no indication that the prosecutor of an unfair labor practice case was not to be included within the term "party." Indeed, as more fully explained in the Board's brief in No. 234, pp. 41–47, Congress, in adding the new provision, evidenced its purpose to change the Wagner Act procedure only in the one respect of requiring that subpenas be issued automatically and that the ruling on their validity be postponed to the filing of a petition to revoke. Hence, Congress fully contemplated that the subpena power traditionally available to the prosecution in an unfair labor practice case would continue to be available under the amendments.

The Administrative Procedure Act confirms the foregoing conclusion. Section 6 (c) of that Act provides that "Agency subpenas authorized by law shall be issued to any party upon request * * *." The general, but non-exclusive, meaning given to the term "party" in Section 2 (b) is broad enough to include the General Counsel in an unfair labor practice case:

> "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding * * *.[18]

That this definition includes the prosecuting agency in administrative adjudication is made explicit, moreover, in Section 5 (c). It is there provided that "Save to the extent required for the disposition of ex parte matters as authorized by law, no such [hearing] officer shall consult any person or *party* on any fact in issue unless upon notice and opportunity for all parties to participate * * *" (emphasis added). It seems clear that "party," as used in this section, encompasses the General Counsel in an unfair labor practice case, for the purpose of Congress here was to make sure "that no investigating or prosecuting officer shall directly or indirectly in any manner influence or control the operations of hearing and deciding officers, except as a participant in public proceedings * * *." Sen. Rep. 752, 79th Cong., 1st Sess., Leg. Hist., p. 203. See also, Sen. Comm. Print, Leg. Hist., pp. 24–25; H. Rep. 1980, 79th Cong., 2d Sess., Leg. Hist., p. 262. Finally, the legislative history of the provisions of the Adminis-

[18] The office of the General Counsel of the Board is plainly an "agency" within the above language, for that term in Section 2 (a) is described as "each authority * * * of the Government," and was meant to include "whatever persons are vested with powers to act." Sen. Rep. 752, 79th Cong., 1st Sess., Leg. Hist., p. 196. And, as stated *supra*, n. 17, with respect to the similar wording of Section 102.8 of the Board's Rules and Regulations, the nature of the General Counsel's functions in an unfair labor practice case bring him within the phrase "entitled as of right to be admitted as a party."

trative Procedure Act dealing with subpenas discloses that Congress gave full recognition to the practice of agency prosecuting authorities in making use of compulsory process. The only reform intended by that Act in this respect was directed, not to the general use made by agencies of subpenas, but to the practice in some instances of imposing discriminatory requirements on private parties applying for subpenas. As stated in the Senate Committee Print explaining the bill which became law, the purpose of the subpena provisions is to (Leg. Hist., p. 27):

> Assure that private parties as well as agencies shall have a right to such subpenas. This is an indispensable requisite to fair procedure since if the private party does not have the benefit of compulsory process he may not be able to secure witnesses or evidence while the agency can have such process for its own purposes. * * *

See also Sen. Rep. 752, 79th Cong., 1st Sess., p. 20, Leg. Hist., p. 206; H. Rep. 1980, 79th Cong., 2d Sess., p. 33, Leg. Hist., p. 265; Attorney General's Manual on Administrative Procedure Act (1947), pp. 67–68.

Accordingly, both the Administrative Procedure Act and the National Labor Relations Act require that petitioners' contention be rejected. Neither of these enactments casts any doubt upon the validity of the essential and established practice of the General Counsel in unfair labor practice cases in making full use of the subpena power wherever necessary to present competent evidence bearing on the issues to be determined.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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APPENDIX

The relevant portions of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001, *et seq.*) are as follows:

DEFINITIONS

SEC. 2. As used in this Act—

(a) *Agency.*—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. * * *

(b) *Person and party.*—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

* * * * *

ADJUDICATION

SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant

to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives.

* * * * *

(c) Separation of functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings.

* * *

* * * * *

ANCILLARY MATTERS.

SEC. 6. Except as otherwise provided in this Act—

* * * * *

(c) *Subpenas.*—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence

sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

* * * * *

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * * * *

(b) *Hearing powers.*—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommment decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

* * * * *

EXAMINERS

SEC. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

The relevant provisions of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956),

in addition to those set forth at pp. 59–63 of the Board's Brief in No. 234, are as follows:

SEC. 102.8 *Party.*—The term "party" as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the act, any person named as respondent, as employer, or as party to a contract in any proceeding under the act, and any labor organization alleged to be dominated, assisted, or supported in violation of section 8 (a) (1) or 8 (a) (2) of the act; but nothing in this part shall be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only.

* * * * *

COMPLAINT

SEC. 102.16 *Hearing; extension.*—Upon his own motion or upon proper cause shown by any other party, the regional director issuing the complaint may extend the date of such hearing.

* * * * *

WITNESSES, DEPOSITIONS, AND SUBPENAS

SEC. 102.30 *Examination of witnesses; depositions.* * * *

* * * * *

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

* * * * *

SEC. 102.38 *Rights of parties.*—Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the trial examiner.

* * * * *

SEC. 102.42 *Filing of briefs and proposed findings with the trial examiner and oral argument at the hearing.*—Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party shall be entitled, upon request made before the close of the hearing, to file a brief or proposed findings and conclusions, or both, with the trial examiner who may fix a reasonable time for such filing, but not in excess of 20 days from the close of the hearing. * * *

* * * * *

EXCEPTIONS TO THE RECORD AND PROCEEDING

SEC. 102.46 *Exceptions or supporting briefs; time for filing; where to file; service on parties; extension of time; effect of failure to include matter in exceptions; oral arguments.*—(a) within 20 days or within such further period as the Board may allow from the date of the service of the order transferring the case to the Board, pursuant to section 102.45, any party may (in accordance with section 10 (c) of the act and section 102.82 and 102.83) file with the Board in Washington, D. C., seven copies of a statement in writing setting forth exceptions to the intermediate report and recommended order or to any other part of the record or proceedings (including rulings upon all motions or objections), together with seven

copies of a brief in support of said exceptions and immediately upon such filing copies shall be served on each of the other parties; and any party may, within the same period, file seven copies of a brief in support of the intermediate report and recommended order. * * *

* * * * *

SEC. 102.47 *Filing of motion after transfer of case to Board.*—All motions filed after the case has been transferred to the Board pursuant to section 102.45 shall be filed with the Board in Washington, D. C., by transmitting seven copies thereof, together with an affidavit of service upon each of the parties. * * *

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